



p.m., East Hartford Police officers Sullivan and Dupont were on foot patrol and were checking the rear area of 1268 Main Street in East Hartford. The Venus Lounge, a strip bar, is located at this address. The location is well known to the East Hartford Police as an area of heavy drug activity, illegal drinking, and prostitution. As Officer Dupont was walking through the parking lot, he shined his flashlight into a black Jeep, where he observed a gun lying on the driver's side of the floor. The door of the vehicle, CT reg. 547PUP, was locked. He summoned his partner, who also observed the gun.

As a result, Dupont contacted his supervisor, Sergeant Egan, and advised him of the situation. Sergeant Egan, along with Officer Proulx, with his K-9, Dakota, traveled to the scene. It was determined that the officers would wait for the owner of the vehicle to return in order to ascertain whether the gun was licensed by whoever was traveling in the vehicle, and why the gun was left lying on the floorboard. To that end, Officers Dupont, Sullivan, and Proulx, handling Dakota, along with Sergeant Egan, stationed themselves at different, but close, locations around the Jeep. Proulx and Dakota were behind a dumpster by which the Jeep was parked.

Shortly thereafter, a black male, later identified to be Hayes, walked up to the vehicle and put the key in the lock. Proulx stood up, identified himself as a police officer, and ordered Hayes not to

move, or he would release a trained police dog.

Rather than comply, Hayes began quickly backing away from Proulx. Hayes reached for his waistband and, fearing that he was reaching for a weapon and attempting to escape, Proulx immediately reacted by releasing Dakota. Proulx and Dupont both saw Hayes remove a clear, plastic baggy, which he tossed backwards. Proulx reported that he "saw exactly the flight of the object and where it landed." *East Hartford Police Department Report, May 13, 2001, subscribed and sworn to by Officer Proulx, at p. 2.*

After Dakota engaged Hayes in the upper leg area, Proulx attempted to subdue him. Hayes resisted by flailing his arms about. Accordingly, Dakota engaged Hayes again in the shoulder area. The officers were finally able to subdue Hayes and handcuffed him.

Immediately after Hayes was under control, Dupont located the clear, plastic baggy thrown away by Hayes, which contained a creme-colored substance which, based on Dupont's training and experience, he suspected to be crack cocaine. Dupont located a second clear plastic baggy containing a creme-colored substance, and a third baggy containing several 9mm bullets, both in the Defendant's front pockets. Additionally, Dupont recovered \$716 in United States currency from Defendant's pockets. *East Hartford Police Department Report, May 14, 2001, subscribed and sworn to by Officer Dupont, at p. 3.*

Dupont next opened the vehicle with the key Hayes had been using and took control of the gun (Colt Pocket NINE series 90, serial # NPO5969). The gun was fully loaded with one round in the chamber, ready to fire. The bullets located in Hayes' pocket were the same type as the bullets located in the gun. The suspected crack cocaine was field tested and showed a positive presumption for cocaine. *Id.* A later laboratory analysis confirmed that the creme-colored substances contained cocaine with a total net weight of 7.6 grams. It was also determined that the firearm had been stolen from the Colt Firearms factory in 1999. Although the gun did not travel in interstate commerce, the ammunition did. Resultingly, Defendant was charged, along with narcotics violations, with being a felon in possession of ammunition.

#### **LEGAL ANALYSIS**

Defendant relies on one prong of a three-prong test set forth in Coolidge v. New Hampshire, 403 U.S. 443 (1971), which test is applied in order to determine probable cause under the "plain view" exception to the Fourth Amendment's warrant requirement. Under Coolidge, the following requirements for a warrantless, plain view seizure must be met:

- (1) the agents must lawfully be on the premises;
- (2) the discovery must be inadvertent; and,
- (3) its incriminating nature must be immediately

apparent.

*Id.* at 464-473.

Hayes acknowledges prongs one and three; he claims suppression of the evidence must be ordered under prong two, alleging that walking up to his vehicle and using a flashlight to look inside fails to render the discovery inadvertent. Hayes also contends that the officers had no basis for a Terry stop of him. See Terry v. Ohio, 392 U.S. 1 (1968).

In contradistinction to the Defendant's assertions, when a police officer looks into a car, with or without a flashlight, no "search" within the meaning of the Fourth Amendment has been carried out. "There is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers." Texas v. Brown, 460 U.S. 730, 740 (1983). "It is likewise beyond dispute that [a police officer's] action in shining his flashlight to illuminate the interior of [a defendant's] car trenche[s] upon no right secured to [the defendant] by the Fourth Amendment." *Id.* at 739-740. See also United States v. Lee, 274 U.S. 559, 563 (1927)(use of searchlight is comparable to the use of a maritime glass or a field glass. "It is not prohibited by the Constitution."). Accord, Mollica v. Volker, 229 F.3d 366, 369 (2d Cir. 2000)(police officer's looking through windows into interior of

car, even when shining a flashlight to illuminate the inside of it, not a search within Fourth Amendment); U.S. v. Ocampo, 650 F.2d 421, 427 (2d Cir. 1981)(even though police officer needed to use flashlight to illuminate inside car, item glimpsed by doing so still in plain view).

Hayes' claim that "for Officer Dupont to have seen the gun in 'plain view', he would have to physically have to [sic] adjust his posture to peer into the vehicle . . ." does not advance his position. "Likewise, the fact that [the police officer] 'changed his position' and 'bent down at an angle so [he] could see what was inside' . . . is irrelevant to Fourth Amendment analysis." Brown, 460 U.S. at 740.

Further, under presently existing constitutional law, there is no "inadvertent discovery" limitation on the plain view doctrine. Bradway v. Gonzales, 26 F.3d 313, 318 (2d Cir. 1994). In Horton v. California, 496 U.S. 128, 129, (1990), the Supreme Court stated that, "even though inadvertence is a characteristic of most legitimate 'plain view' seizures, it is not a necessary condition."

For each of these reasons, then, Hayes' reliance on Coolidge is misplaced and unavailing.

So, too, is his assertion that he was not properly subject to a Terry stop. "One general [governmental] interest is of course that

of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." Terry, 392 U.S. at 22. In the present case, at the time the officers set up surveillance of the vehicle, they had no intention of arresting Defendant merely for having a gun in his car, since they had no way of knowing whether Hayes had a permit or was otherwise authorized to carry a gun. Due to the high crime activity in the area of the vehicle, well known to the officers, they had every cautious interest in waiting for the driver of the gun-laden car to appear and to engage him in conversation with regard to the gun. *Id.* In short, "p[olice officers enjoy the 'liberty ( . . . possessed by every citizen) to address questions to other persons." United States v. Mendenhall, 446 U.S. 544, 553 (1980), quoting Terry, 392 U.S. at 32 (*Harlan, J., concurring*). See also Terry, 392 U.S. at 34 (*White, J., concurring*)("[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets."). Moreover, inasmuch as the officers already knew that there was a gun in the car, they were well within their rights to conduct a Terry stop of Hayes and pat him down for weapons before questioning him about the gun in the car. Terry, 392 U.S. at 23-24. Further, upon

being directed by Officer Proulx to stop, Hayes immediately reached for his waistband. Under such facts, "it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Id.* at 24. The officers did so and no more.

**CONCLUSION**

Based on these analyses, the Court holds that all of the physical evidence seized from Hayes and his car on May 31, 2001, is admissible; hence, his Motion to Suppress [Doc. No. 28] is hereby DENIED.

SO ORDERED

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ELLEN BREE BURNS  
SENIOR UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut this \_\_\_\_ day of August, 2003.